Filed 10/26/12 In re B.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re B.M., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. M.L., Defendant and Appellant.	E055946 (Super.Ct.No. SWJ010264) OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

Two-year-old B.M., the minor, came to the attention of the Riverside County Department of Public Social Services (DPSS) after a welfare check resulted in the arrest of her mother, M.L., for being under the influence of drugs. Both mother and father (not a party to this appeal[1]) were ordered to participate in court-ordered services including a substance abuse program, and were given 12 months of services. Mother participated in services, but positive drug tests and failure to complete court-ordered programs resulted in termination of services along with the setting of a hearing to select and implement a permanent plan of adoption. (Welf. & Inst. Code,[2] § 366.26.) At the section 366.26 hearing, the juvenile court denied mother's petition to modify the prior order terminating services and setting the section 366.26 hearing without a hearing, and subsequently the court terminated parental rights, resulting in this appeal by the mother.

On appeal, mother argues that the juvenile court erred (1) in denying her section 388 petition without a hearing, and (2) in finding that terminating parental rights would not be detrimental due to lack of a beneficial parent-child relationship.

BACKGROUND

On August 9, 2010, a welfare check was conducted and mother was found to be under the influence of Xanax, Vicodin (for which mother had no prescription), and

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[1] Because father is not a party to this appeal, he will only be mentioned where necessary for context.

[2] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

marijuana, although despite having completed a substance abuse program a few months earlier. Mother and two-year-old B.M., were staying with the maternal grandmother who had a history of mental illness, and mother was driving a motor vehicle with a suspended license. The law enforcement officer conducting the welfare check was familiar with mother because that officer had previously contacted mother after her boyfriend beat her up pretty badly. The boyfriend (who was not the father of the child) had also vandalized mother's car the day before the welfare check, during a violent episode. Father was living in a sober living home after completing a detoxification program to address his use of heroin, although his drug use history also included cocaine and ecstasy.

Mother's arrest and father's residence in a sober living facility required detention of the child. A dependency petition was filed on August 11, 2010, alleging that the parents failed to protect the minor due to their substance abuse. At the jurisdictional hearing, the parents submitted the matter for decision on the basis of the social worker's reports. The court made a true finding that the minor was a person described by section 300, subdivision (b), sustained the petition, removed the minor from the parents' custody, and directed the parents to comply with family reunification services. The court also directed that the child be placed with paternal grandparents if and when the paternal grandfather submitted a hair follicle test with negative results.

By the time of the March 2011 status review report, mother had a new apartment and job, but had been directed to leave her aunt's residence because she was not doing what she should towards reunification. The minor was doing well in the home of the paternal grandparents, where mother originally had liberal visitation, but mother's threats

and complaints against the caretakers resulted in more regimented visitation. At one visit, where mother was allowed to walk the minor around the cul-de-sac near the paternal grandparents' residence, mother took the minor to her aunt's home without informing the paternal grandparents. Otherwise, the visits went well and the mother and child appeared bonded, although mother seemed to have difficulty managing the child's occasional defiant behavior.

The six-month review report also indicated that mother was participating in counseling and therapy, but she had only completed intake and attended three sessions, missing three other sessions. She had not participated in parenting education and her progress with her substance program was unsatisfactory due to two missed and one diluted drug tests. She had also failed to participate in a domestic violence program. At the six-month review hearing of April 6, 2011, the court extended services for the parents for an additional six months, ordered the parents to participate in drug testing, and continued the dependent status of the child.

The 12-month review report recommended that services to the parents be terminated. During this period, mother admitted making contact with her violent ex-boyfriend despite the restraining order, but later denied it, saying she had made it up when she thought the social worker would use the information against her. Mother had been generally compliant with services, but had submitted two positive drug tests, during this period. The conflicts between the mother and the paternal grandparents continued, affecting the frequency of mother's visits with the minor. However, she was otherwise compliant with services: she had completed and was discharged from therapy and

parenting education, as well as the domestic violence program. The social worker also noted that mother associated with people who led her to use marijuana during this period.

An addendum to the 12-month review report provided information about a recent visit in which the minor was upset at the prospect of missing a weekly visit to a ranch. As a result, the minor did not want to participate in the visit, although she did so after approximately a half hour. After visiting for a half hour, the minor cried and wanted to go home. During the visit, a DPSS employee overheard mother denigrate the paternal grandparents. The social worker asked mother to submit to a drug test, but mother did not.

The addendum report noted that mother was in compliance and that she had been promoted to phase 4 of the family preservation program. However, due to mother's missed drug tests, the social worker was still concerned that she was unable to produce negative test results consistently. At the 12-month review hearing conducted on November 14, 2011, the court terminated services and scheduled a hearing pursuant to section 366.26, to select and implement a permanent plan of adoption. Mother filed a writ petition which was denied on the merits on February 16, 2012.

On March 12, 2012, mother filed a petition to modify the prior order terminating services and setting the section 366.26 hearing. The petition alleged that mother now lived in a three-bedroom house with a roommate, and had employment through her roommate's business, while seeking full-time employment in the restaurant business. The petition further alleged that mother had attended from three to five 12-step self-help meetings, attended church, and had been clean for six months.

On March 13, 2012, the following day, the court conducted the selection and implementation hearing pursuant to section 366.26. The court denied the petition after finding it did not allege a change of circumstances. The court found that the minor was adoptable, that termination of parental rights would not be detrimental because none of the exceptions contained in section 366.26 was applicable, and it terminated parental rights. The mother appealed.

DISCUSSION

1. The Denial of Mother's Section 388 Petition, Without Holding an Evidentiary Hearing, Was Proper.

Mother filed a section 388 petition on the eve of the section 366.26 hearing. Mother's petition alleged that she had a new residence, was working for her roommate, and had attended from three to five 12-step meetings. The juvenile court determined that mother's declaration did not show any changed circumstances and denied the petition without a hearing. Mother contends that the juvenile court's summary denial of her section 388 petition without affording a hearing violated her right to due process of law. We disagree.

Section 388, subdivision (a), permits a parent to petition for a hearing to change, modify, or set aside any order of the court previously made or to terminate jurisdiction on grounds of changed circumstances or new evidence. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) Subdivision (d) of section 388 provides that if it appears that the best interests of the child may be promoted by the proposed change of order, the court shall order that a hearing be held. Rule 5.570(h) of the California Rules of Court requires

that section 388 hearings be conducted in the same manner as a dispositional hearing if (a) the requested change relates to a more restrictive level of placement, or (b) there is a due process right to confront and cross-examine witnesses. Otherwise, proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court. (*In re Lesly G.*, at p. 913.)

Section 388 petitions are liberally construed in favor of granting a hearing to consider the request. (*In re B.C.* (2011) 192 Cal.App.4th 129, 141; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414.) But the right to hearing does not necessarily entitle the petitioning party to a full evidentiary hearing. It is well recognized that due process is a flexible concept which depends upon the circumstances and a balancing of various facts. (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.) Due process requires a balance. (*Ibid.*, citing *In re Sade C.* (1996) 13 Cal.4th 952, 992.) A hearing is not required if the petition fails to make a prima facie showing (1) of a change of circumstances or new evidence requiring a changed order, and (2) the requested change would promote the best interests of the child. (*In re Justice P*. (2004) 123 Cal.App.4th 181, 188-189, citing *In re Anthony W*. (2001) 87 Cal.App.4th 246, 250.)

In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (See *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.) In *Jamika W.*, the reviewing court affirmed the denial of a section 388 petition without a hearing where facts alleged in the petition were part of the ongoing record in the case with which the juvenile court was thoroughly familiar.

Neither the statute (section 388) nor the rule of court (Cal. Rules of Court, rule 5.570(h)) mandates an evidentiary hearing, and due process does not necessarily compel the court to conduct an evidentiary hearing on the petition. Such a hearing is only appropriate where the petition sets forth a prima facie showing of changed circumstances. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 [if the liberally construed allegations do not make a prima facie showing, a hearing is not required].)

Here, mother's petition alleged that she had a new residence, was employed, and attending 12-step meetings. Although the petition alleged mother had been clean for six months, there was no evidence of drug tests to corroborate this statement. While the petition alleged she had attended three to five 12-step meetings, and that she had a sponsor, this accomplishment was too little too late where substance abuse was the problem that led to the original intervention and where she had not made significant progress in that program.

The court had terminated services at the referral hearing due to mother's inability to remain drug free and her poor judgment in contacting her violent boyfriend and another person who provided her with drugs, causing her relapse. Mother's circumstances, as reflected in the section 388 petition, were improved, but were not materially changed. Attending a handful of 12-step meetings does not show she was able to produce negative test results consistently or avoid relationships characterized by violence.

The court properly found there were now changed circumstances, so a hearing on mother's 388 petition was not required. The denial of a hearing did not violate mother's due process rights, and was not an abuse of discretion.

2. **The Parent-Child Relationship Did Not Compel a Conclusion that Termination of Parental Rights Would Be Detrimental to the Child.**

Mother argues that the trial court erred in terminating her parental rights due to the existence of a beneficial parent-child relationship within the meaning of section 366.26, subdivision (c)(1)(b)(i). We disagree.

Section 366.26, subdivision (c)(1), provides that if the court determines, based on the [adoption] assessment and any other relevant evidence, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption, unless one of several statutory exceptions applies. Once the court determines a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental under one of the exceptions listed in section 366.26, subdivision (c)(1)(B). (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 809, citing *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.) We must affirm a trial court's rejection of the exceptions if the ruling is supported by substantial evidence. (*In re Zachary G.*, at p. 809.)

One such exception applies when the court finds a compelling reason for determining that termination would be detrimental to the child because the parents have maintained regular visitation and contact with the child, and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).) This exception applies only

when the relationship with a natural parent promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) A parent's "frequent and loving contact" with the child was not enough to sustain a finding that the exception would apply, when the parents "had not occupied a parental role in relation to them at any time during their lives." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) The determination of whether a beneficial parent-child relationship exists is reviewed for substantial evidence. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

To establish that the parents have occupied a parental role, it is not necessary for a parent to show day-to-day contact and interaction. (*In re S.B.* (2008) 164 Cal.App.4th 289, 299; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) As the court observed in *In re S.B., supra,* if that were the standard, the rule would swallow the exception. (*In re S.B.,* at p. 299.) Instead, the court determines whether the parent has maintained a parental relationship, or an emotionally significant relationship, with the child, through consistent contact and visitation. (*Id.* at pp. 298, 300-301.)

Thus, to overcome the preference for adoption and avoid termination of the natural parent's rights, the parent must show that severing the natural parent-child relationship would deprive the child of a *substantial,* positive emotional attachment such that the child would be *greatly* harmed. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466 [italics in original], citing *In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1342.) The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the

positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs. (*In re Angel B.*, at p. 467; see also *In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.)

As to the first two criteria, they do not support mother's argument. While the minor had spent her first two years in mother's custody, her tender age at the time of removal means she spent half her life in out-of-home placement with her relative caretakers.

Regarding the third criterion, the record shows that mother did visit regularly, and the minor appeared to have a bond with her. However, there is nothing in the record to show that the bond was of a nature that would compel a conclusion that termination of parental rights would be detrimental to the child. The visits described in the later reports show mother was unable to redirect the minor when the child had a tantrum, suggesting that her parenting skills were still extremely limited. On the other hand, the child was strongly attached to her adoptive paternal grandparents, who are fully capable of meeting her needs, and she was happy and comfortable in their home. As to the fourth criterion, there was no evidence that the minor has any needs that can be met only by the mother. (*In re Helen W.* (2007) 150 Cal.App.4th 71, 81.)

Thus, despite the fact the minor appeared to have a bond with the mother, it was not such a substantial emotional attachment that the child would be greatly harmed if it were terminated. There is substantial evidence to support the juvenile court's finding rejecting the existence of an exception to section 366.26.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.